

Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the United States Army Corps of Engineers (Corps) for any discharge of "dredged or fill material" into the "navigable waters" of the United States. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States," which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

4. In approximately September 1999, Respondent, through its employees and/or contractors, and using earth moving machinery, excavated an approximate 240 feet by 10 feet pilot channel across an oxbow meander of the North Wyaconda River to divert flow from the main channel of the North Wyaconda River. A portion of excavated materials was discharged into the original channel of the North Wyaconda River to create "plugs" on the upstream and down stream ends of the 1,100 feet by 60 feet oxbow meander (hereafter "discharge sites," See, Attachment 1).

5. The Corps conducted an on-site inspection on September 30, 1999, which documented the discharges of fill material described above. On October 6, 1999, the Corps issued Respondent a Cease and Desist Order which directed Respondent to restore the original stream channel. On November 5, 1999, the Corps performed a second site inspection and found that Respondent had partially reopened the upstream and downstream ends of the meander, but that fill discharged by Respondent remained in place within the North Wyaconda River channel.

6. By correspondence dated February 9, 2000, the Corps informed Respondent that to resolve the violation, Respondent was required to completely remove all earthen material discharged into the North Wyaconda River, and the pilot channel was required to be filled with compacted fill.

7. On April 7, 2000, Respondent submitted an incomplete "after-the-fact" permit application for the September 1999 fill of the North Wyaconda River. In Respondent's permit application, Respondent stated that the purpose of the September 1999 discharges was to "stop erosion in the horseshoe bend, thus ...saving 2 house trailers and motocross race track."

8. On June 14, 2000, Respondent and the Corps entered into an agreement which allowed for a tolling of the statute of limitations for the time required to process Respondent's after-the-fact permit application, plus one year. By correspondence dated June 16, 2000, the Corps informed Respondent of that the permit application was incomplete and requested additional information. On June 30, 2000, Respondent relayed to the Corps and in this response stated that no more excavation of the filled areas would be performed.

9. On October 12, 2001, the Corps public noticed a proposed after-the-fact permit for the September 1999 discharges. Within the Public Notice, the Corps estimated that Respondent had placed 940 cubic yards of earthen material in the channel of the North Wyaconda River to the upstream and downstream plugs in the channel. The Public Notice also estimated that an "additional 4,000 cubic yards of material will enter the aquatic ecosystem as the sidewalls and bottom of the pilot channel erode into the North Wyaconda River." The Public Notice solicited

comments from other state and federal agencies with interest and oversight in the environmental impacts of the September 1999 discharges.

10. By correspondence to the Corps dated November 8, 2001, EPA provided comments on the proposed after-the-fact permit. In this letter, EPA states, "We recommend that he [Mr. Kirkpatrick] be required to restore the channel reach lost as a result of his project. This approach will best maintain the chemical, physical and biological integrity of the stream and its watershed. We recommend that an after-the-fact permit authorizing the channel cut-off not be issued."

11. By correspondence to the Corps dated November 13, 2001, the Missouri Department of Conservation (MDOC) provided comments on the proposed after-the-fact permit. In this letter, the MDOC states, "It is our recommendation that Mr. Kirkpatrick's application be denied...It is our hope that every effort will be made to restore the site to preproject conditions. The new channel should be filled in and the old channel reconnected to the stream."

12. By correspondence to the Corps dated November 16, 2001, the United States Department of Interior, Fish and Wildlife Service (FWS) provided comments on the proposed after-the-fact permit. In this letter, the FWS states "channelization causes severe and irreversible harm to the natural and physical communities of the area, including their associated fish and wildlife. The Service strongly opposes channelization such as was done by the applicant...Accordingly, we recommend that pending request for permit be denied, and that measures be taken to immediately restore flow to the former meandering channel."

13. By correspondence to the Corps received on November 19, 2001, the Missouri Department of Natural Resources (MDNR) provided comments on the proposed after-the-fact permit. In this letter, MDNR states, "This project has the potential to contribute further to the degradation of waterways in this watershed. No permit should be issued for this project in its present form, since we believe erosion and sedimentation conditions would worsen...[T]his project is not consistent with the Missouri Water Quality Standards and it is subject to a denial of Section 401 Water Quality Certification."

14. By correspondence to Respondent dated November 27, 2001, the Corps informed Respondent that the after-the-fact permit application for the September 1999 discharges was denied on the basis that MDNR had denied Section 401 water quality certification. The Corps' letter also gave Respondent thirty (30) days to provide additional information and permit modification proposals to address the concerns expressed by the state and federal agencies that had commented on the proposed after-the-fact permit. The Corps' letter also informed Respondent that if acceptable permit modifications were not submitted, the case would be referred to EPA for enforcement. Respondent failed to provide the requested information and/or permit modifications, and accordingly, by correspondence dated January 15, 2002, the Corps referred the September 1999 discharges to EPA for enforcement as violations of Section 404 of the CWA.

15. By correspondence dated June 4, 2003, and September 24, 2003, EPA issued Respondent two separate Requests for Information, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. 1318, that directed Respondent to provide EPA information regarding the September 1999 discharges. To date, EPA has not received a response from Respondent to either Request for Information.

Specific Findings

16. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

17. During the time periods of the discharges of fill material into the North Wyaconda River described above, Respondent owned the property on which the discharge sites are located.

18. Respondent's discharge of dredged and/or fill material within the North Wyaconda River altered the natural drainage pattern of the North Wyaconda River, resulting in the following:

- a. The blockage of the natural channel of the North Wyaconda River reduced the length of the stream from 1,110 feet to 240 feet, or by an estimated 460%;
- b. The pilot channel was not cut to the depth of the grade of the previous natural channel of the North Wyaconda River, resulting in erosion of pilot channel as drainage scoured the pilot channel to the grade of the North Wyaconda River; and
- c. The ongoing erosion of the pilot channel poses an ongoing threat to the downstream ecosystem.

19. The earth moving machinery referenced in Paragraph A.5, above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. The dredged and/or fill materials discharged by Respondent into the North Wyaconda River are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The discharge of the dredged and/or fill material into the waters of the United States described in Paragraph A.5, above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

22. At the time of Respondent's discharge of pollutants described above, the discharge sites were within the "waters of the United States," within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

23. Respondent's discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

24. To date, Respondent has failed to restore the filled areas of the North Wyaconda River to their pre-discharge configuration. The adverse effects on the environment of Respondent's illegal discharges into the North Wyaconda River are ongoing. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

25. To date, Respondent has failed to respond to either the June 4, 2003 and September 24, 2003, Requests for Information, issued by EPA to Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318. This failure constitutes an ongoing violation of Section 308 of the CWA, 33 U.S.C. § 1318.

B. ORDER FOR COMPLIANCE

Based on the Findings of Violation set forth above and, pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED as follows:

1. Within fifteen (15) days after receipt of this Order, Respondent shall notify EPA in writing whether it intends to comply with the terms of this Order.
2. Within thirty (30) days after receipt of this Order, Respondent shall provide full and complete responses to EPA's June 4, 2003, and September 24, 2003, Requests for Information, issued by EPA to Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. 1318.
3. In the event Respondent states that it does not intend to comply with the terms of this Order and/or fails to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order and/or seek additional penalties for such noncompliance with the terms of Order.

Restoration Plan

4. Within thirty (30) days after receipt of this Order, Respondent shall submit a Restoration Plan to EPA for review and approval that shall satisfy the following requirements and include, at a minimum, the following information:
 - a. The Restoration Plan shall be prepared by a Professional Engineer (P.E.) with a background in hydrology;
 - b. The Restoration Plan shall include an analysis of the hydrology of the discharge sites and/or areas impacted by the discharges, that is presented in sufficient detail to determine the areas impacted by the discharges, quantity of flows and potential flooding frequencies within the North Wyaconda River and to provide an adequate basis for review of the Plan;

- c. The Restoration Plan shall identify and describe the design of all drainage control devices (erosion control, dams, etc.) that control drainage into the areas impacted by the discharges of illegal fill;
 - d. The Restoration Plan shall identify all areas of the North Wyaconda River directly impacted by the discharges of illegal fill (i.e., that have suffered erosion, backup of water, overcutting by water), and all downstreams areas impacted by sedimentation from the discharge sites;
 - e. The Restoration Plan shall propose the work required to remove the discharged fill and to restore the North Wyaconda River to pre-discharge configurations, including, the work required to remove fill from the discharge sites and to fill the pilot channel;
 - f. The Restoration Plan shall describe the types of equipment proposed to accomplish the removal of the fill, methods to minimize erosion during the removal of fill and designated upland disposal locations for the removed fill;
 - g. The Restoration Plan shall evaluate alternatives for bank stabilization, and propose an appropriate method(s) of bank stabilization designed to prevent future erosion (i.e., placement of sod or seeding of new grass, placement of erosion control devices such as rip rap);
 - h. The Restoration Plan shall identify any additional proposed areas of fill within the North Wyaconda River that are required to implement the Restoration Plan and shall describe compaction and surface stabilization methods for such proposed fill areas. Specifically, the Restoration Plan shall identify the work required to fill the pilot channel and to restore flow solely to the original channel of the North Wyaconda River; and
 - i. The Restoration Plan shall propose a schedule of no more than six (6) months to accomplish the removal of the fill and the restoration and stabilization of areas impacted by the fill and consequent flooding, overcutting and erosion.
5. At its sole discretion, EPA may elect to approve the Restoration Plan as submitted by Respondent, return the Restoration Plan for modification and resubmission by Respondent, or modify the Restoration Plan and then approve the Restoration Plan as modified. Compliance with the Restoration Plan, as approved by EPA, shall be enforceable under the authority of this Order for Compliance and the CWA.
6. In accordance with the requirements and schedules contained in the approved Restoration Plan, Respondent shall remove the discharged fill materials described in Paragraph A.4, above, to upland sites and shall restore the discharge sites to their condition prior to such discharges in a manner that will address the ongoing adverse impacts of the illegal discharges.

7. All documents required to be submitted to EPA by this Order, or by the approved Restoration Plan shall be submitted by mail to Howard C. Bunch, Assistant Regional Counsel, at the address below.

8. At the time of its submission to EPA, Respondent shall also provide a copy of the proposed Restoration Plan to Mr. Gene Walsh, Enforcement Section Regulatory Branch, United States Army Corps of Engineers at the following address:

United States Army Corps of Engineers
Clock Tower, Bldg.
P.O. Box 2004
Rock Island, Illinois 61204-2004

9. Upon approval of the Restoration Plan by EPA, thereafter Respondent shall report in writing to EPA every two (2) weeks on all work undertaken pursuant to the requirements of the approved Restoration Plan.

Access


10. Within fifteen (15) days receipt of this Order, Respondent shall obtain and provide to EPA site access agreements from the owners of property where fill was placed, or property impacted by the placement of fill and any consequent flooding, overcutting and erosion. Such agreements shall provide access for EPA and the Corps, and their contractors and oversight officials, Respondent and its authorized representatives to inspect the discharge sites and work to be performed under the required Restoration Plan. Such agreements shall specify that Respondent is not EPA's representative with respect to any liability associated with work required pursuant to the approved Restoration Plan.

11. If access agreements are not obtained within the time period referenced above, Respondent shall immediately notify EPA of its failure to obtain access and shall provide documentation to EPA of its "best efforts" to obtain access. "Best efforts" as used in the above Paragraph shall include, but is not limited to, offers of reasonable consideration in exchange for access as necessary to conduct the work required by the approved Restoration Plan.


Effect of Compliance with the terms of this Order

12. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits. Specifically, Respondent shall consult with the Corps, and shall obtain all permits that the Corps determines are necessary to address the discharges and/or to implement the approved Restoration Plan.

13. Compliance with the terms of this Order shall not relieve Respondent of any liability for, or preclude EPA from initiating an enforcement action to recover, penalties for any violations of the CWA, pursuant to Section 309(g) of the CWA, 42 U.S.C. § 1319(g).


LEO J. ALDERMAN
Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region VII

3/31/04
DATE


HOWARD C. BUNCH
Sr. Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII

3/31/04
DATE

CERTIFICATE OF SERVICE

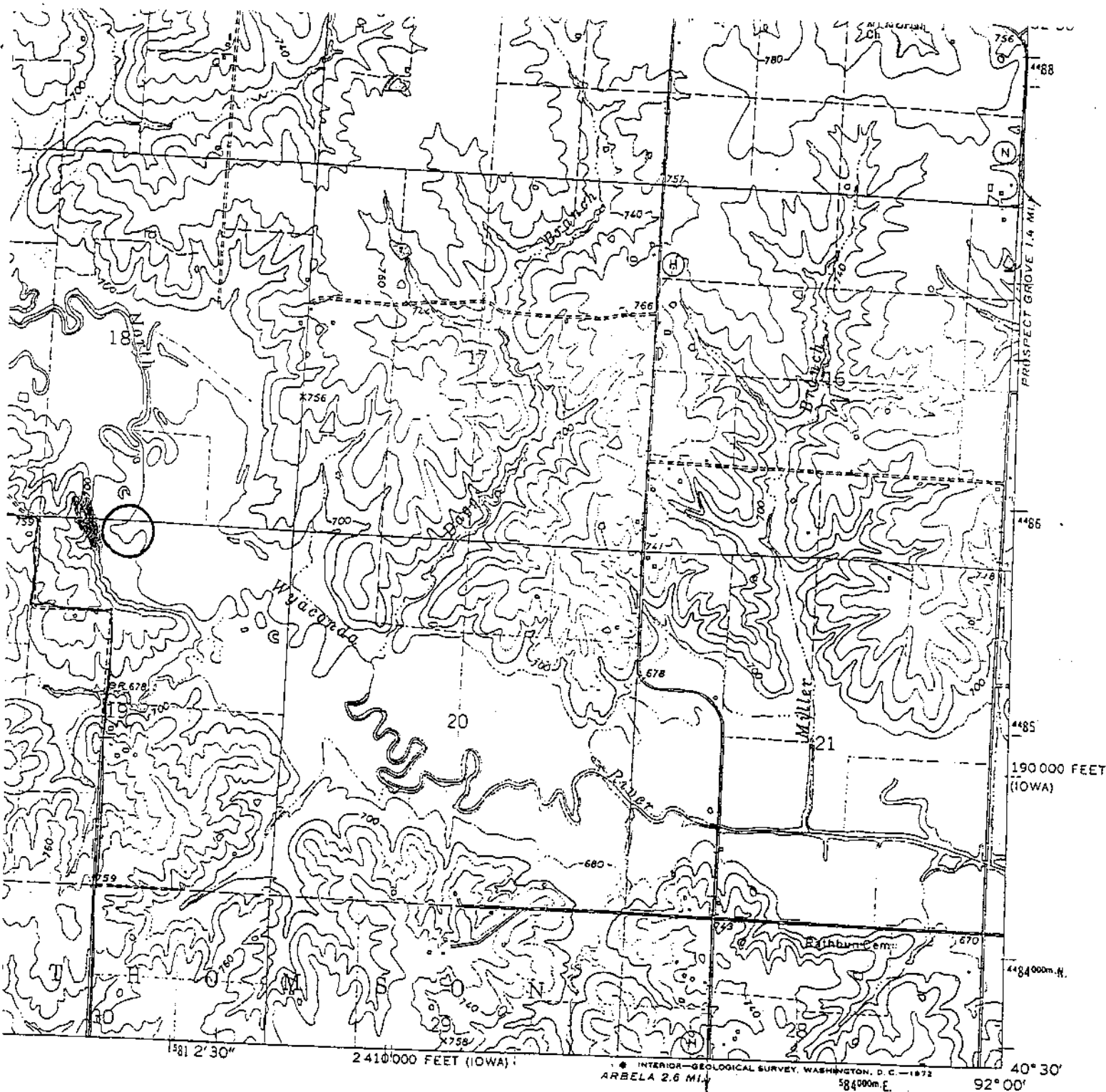
I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

LYNN KIRKPATRICK
Route 1, Box 160
Arbela, Missouri 63432

3/31/4
Date

Debby White

ATTACHMENT 1:



INTERIOR-GEOLOGICAL SURVEY, WASHINGTON, D. C.—1972
 ARBELA 2.6 MI. 584000m. E.

ROAD CLASSIFICATION

Secondary highway, all weather, Light-duty road, all weather,
 hard surface improved surface
 Unimproved road, fair or dry
 weather

○ State Route



QUADRANGLE LOCATION

CEMVR-OD-P-389800
 Lynn Kirkpatrick
 Stream Channelization
 Location Map
 Sheet 1 of 5

AZEN, MO.—IOWA
 N4030—W9200/7.5

1970

AMS 7565 II SE—SERIES V879

W

LOCATION:

Memphis

ROUTE 15

MILTON
Iowa

ROUTE BB

Iowa 2

ROUTE 136

ROAD

RACE TRACT

CROSSING

PROJECT

ARRELA. Mo

ROUTE H

2

LIST OF ADJACENT PROPERTY OWNERS
NO. ADDRESS

1. CEMVR-OD-P-389800
Lynn Kirkpatrick
Stream Channelization
Vicinity Map
Sheet 2 of 5

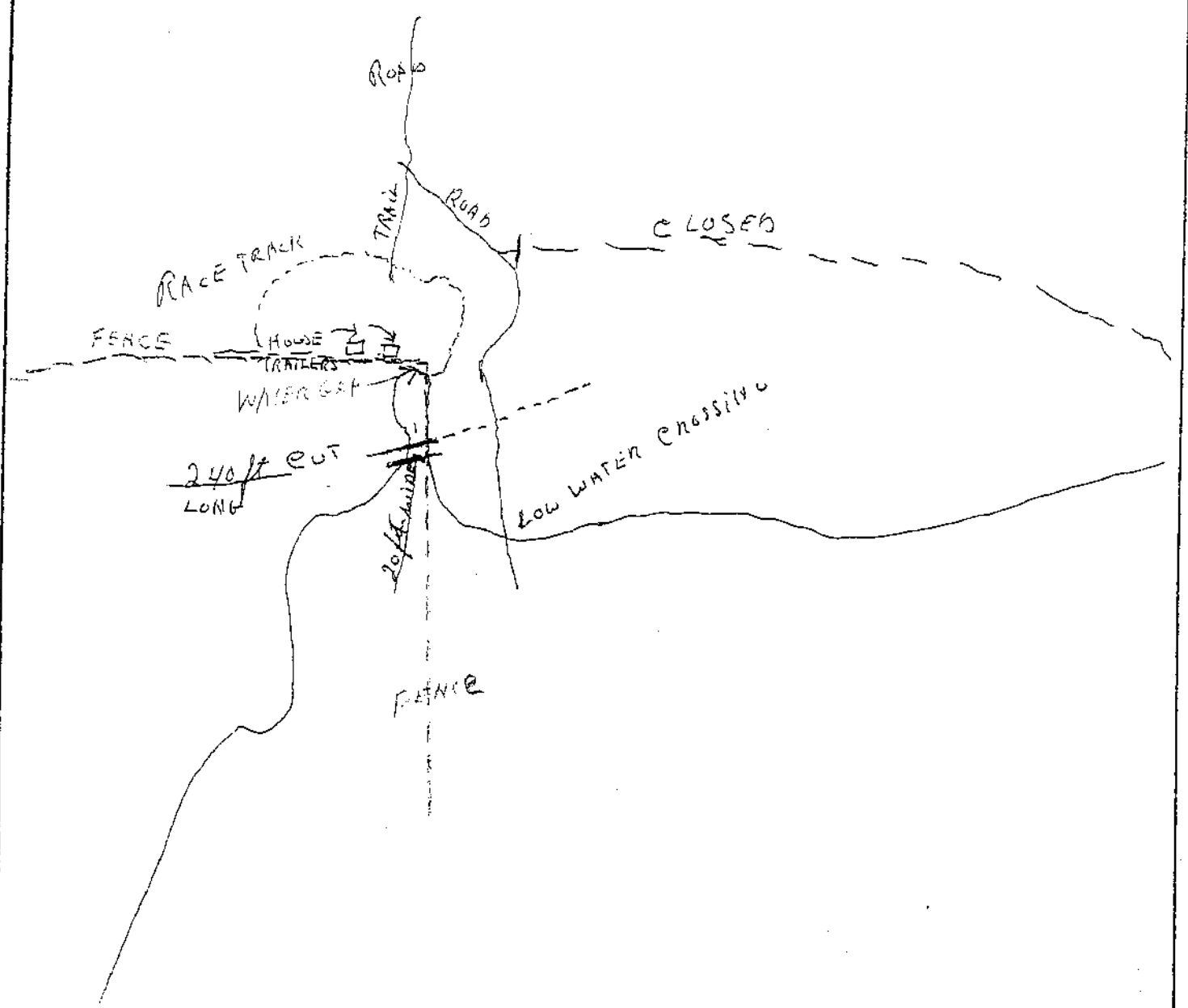
PROJECT DESCRIPTION:

SEC 18
T 66-67
R 16-W

LOCATION:

SEOTLAND COUNTY
MISSOURI

W

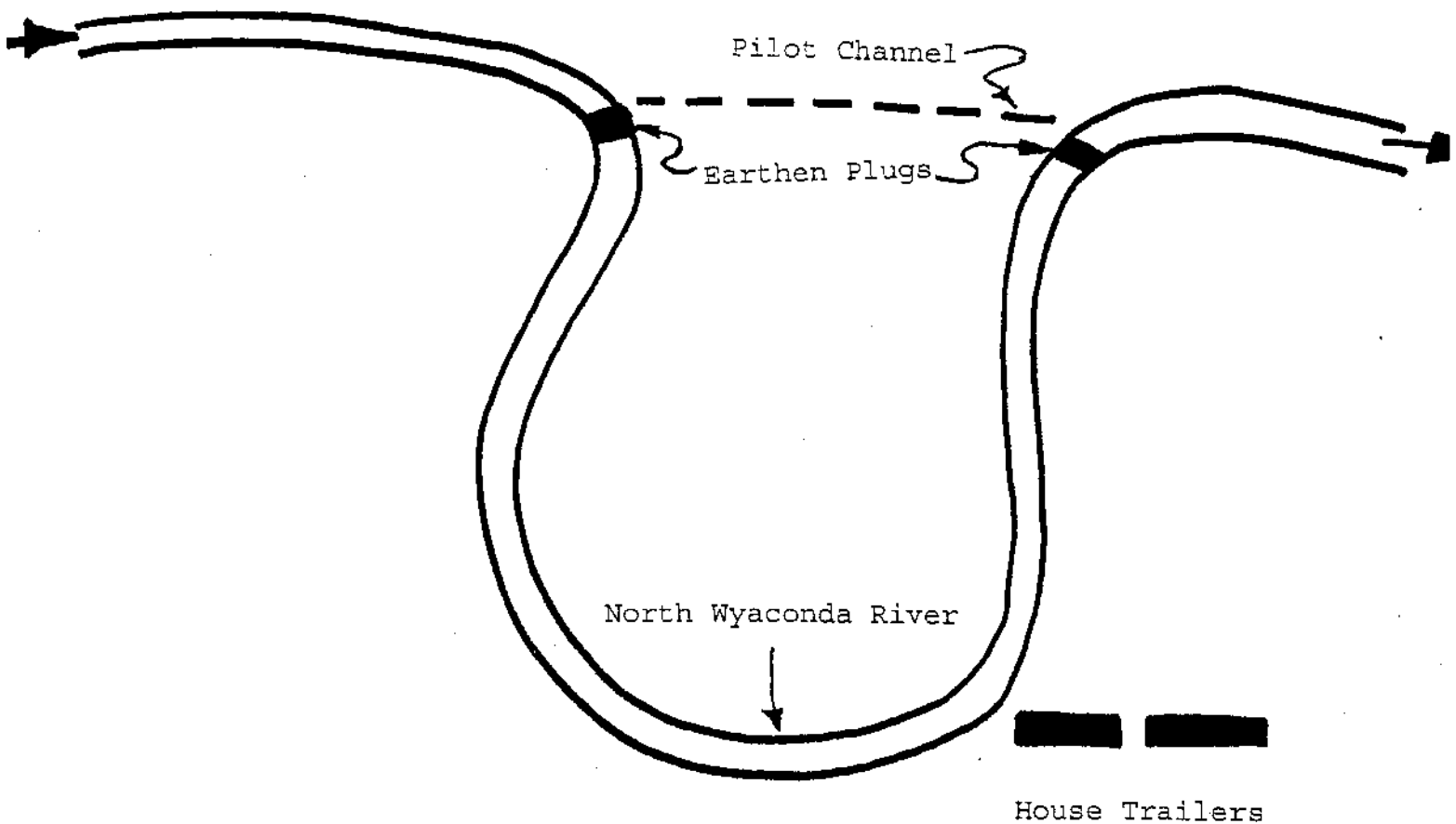


CEMVR-OD-P-389800
Lynn Kirkpatrick
Stream Channelization
Vicinity Map & Site Plan
Sheet 3 of 5

E

Stream Channelization Project

Stream Flow →



House Trailers

CEMVR-OD-P-389800
Lynn Kirkpatrick
Stream Channelization
Site Plan
Sheet 4 of 5

Dirt Bike Track

228-L

SCOTLAND

I-3
I-4

30

31.4

33

with
40.00
88.0

10

20.8

CEMVR-OD-P-389800
Lynn Kirkpatrick
Stream Channelization
Aerial Photo - Project Site
Sheet 5 of 5